--IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1094 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASLAM IBRAHIM SANDHI & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MJ BUDDHABHATTI FOR JM BUDDHBHATTI for Appellants.
MR HM PRACHCHHAK APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 27/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellants have preferred this appeal under

Section 374 (2) of the Code of Criminal Procedure, 1973, and challenged judgment dated 6-11-1997 passed by the learned Addl. Sessions Judge, Gondal, Dist. Rajkot in Sessions Case No. 92 of 1997 whereby they are convicted for the offence punishable under Sections 302 read with Section 34 of the I.P. Code and sentenced to undergo life imprisonment and pay fine of Rs.1000/- each, in default thereof, each of the appellants to undergo simple imprisonment of one month.

2. The facts emerging from the prosecution case, in brief, are that the accused were tenants in the property purchased by deceased Alibhai who got it vacated before about five years of the incident therefore did not vacate the property and left after applying lock to the property; that with a view to take revenge, accused No.1 Aslam Ibrahim Sanghi and accused No. 2 Rafiq Ibrahim knife and accused No. 3 Amad Ibrahim with 'gupti' attacked Alibhai at about 2-00 a.m. On 13-3-1997 with their weapons at Pandheriya sheri, Moti Bazaar in Gondal town and inflicted fatal injuries on the person of Alibhai which resulted into his death.

3. On the basis of the F.I.R. filed by Ahmadbin Abudbin before Gondal City Police Station offence was registered as I – CR No. 49/97 for the offences punishable u/s 302 and 34 of the I.P. Code and u/s 37 (1) and 135 of the Bombay Police Act and investigation was started. During the course of the

investigation panchnama of scene of offence, panchnama of discovery of muddlamal knives & 'gupti', inquest panchanama and arrest panchanama of the accused etc. were drawn. Dead body of deceased Alibhai was sent to the hospital for postmortem. The accused were arrested and the muddamal articles were sent to F.S.L. for analysis.

4. On completion of the investigation, charge sheet was laid before the learned Addl. Chief Judicial Magistrate, Gondal, Dist. Rajkot. Since the offence was triable by the Court of Sessions, the case was committed to the Court of Addl. Sessions Judge, Gondal and it was registered as Sessions Case No. 92 of 1997. The learned Addl. Sessions Judge, Gondal framed charge Exh. 1 against the accused for the offence punishable u/s 302 read with Section 34 or 114 of the I.P. Code. The charge was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence in the form of oral and documentary evidence. On completion of recording of evidence by prosecution, the learned trial Judge explained to the accused the incriminating circumstances appearing against them in the evidence and recorded their further statement u/s 313 of the Code of Criminal Procedure, 1973. In the further statements the accused denied having committed the offence and stated that false case is filed against them.

5. After hearing the learned A.P.P. for the State and learned advocate for the accused the learned trial Judge came to the conclusion that the prosecution has proved the case beyond reasonable doubt against the accused and convicted them for the offence punishable u/s 302 read with Section 34 of the I.P. Code and sentenced them as mentioned hereinabove. Therefore, the accused have challenged the judgment of the trial court in this appeal.

6. We have heard the learned advocate for the appellants and learned A.P.P. for the respondent – State at length and in great detail. We have also perused the judgment and record & proceedings of the case.

7. Learned advocate Mr. M.J. Buddhabhatti submitted that the witnesses examined by the prosecution are the relatives of the deceased and they are chance witnesses and interested witnesses. The trial court ought not to have based conviction relying on the depositions of such witnesses. He also submitted that the evidence of the witnesses is in conflict with the medical evidence. According to the prosecution case, the witnesses took the victim to the hospital in auto-rickshaw. However, neither clothes of the witnesses have not been recovered nor auto-rickshaw-driver in whose rickshaw the deceased was taken to the hospital is examined. He also submitted that this lapse indicates that the alleged eye witnesses must have reached at the place

of incident after occurrence. He also submitted that the incident occurred in a thickly populated area of Gondal town and the victim must have raised shouts. However, no witness from the said locality has been examined. He also submitted that there is no evidence with regard to actual occurrence of the incident and the deceased must have been lying at the spot much prior to the time alleged by the prosecution and the incident must have occurred before 2-00 a.m. as the evidence indicates that deceased had returned to Gondal from Dahod at midnight. Therefore, there is doubt about time of the incident. He also submitted that the panch witnesses were the auto-rickshaw drivers and they have not supported the prosecution case. Therefore, the panchnama of discovery of weapons is not proved. He also submitted that there is delay in filing the complaint and the delay is not explained. Therefore, the prosecution has failed to prove the charge beyond reasonable doubt and the appellants are required to be acquitted. In support of his arguments, the learned advocate for the appellants relied on the decision of the Supreme Court in Khima Vikamshi and others, V State of Gujarat, reported in AIR 2003 SC 1326.

8. Learned A.P.P. Mr. H.M. Prachchhak for the respondent – State vehemently opposed the appeal and submitted that the prosecution has proved the case beyond reasonable doubt against the appellants by adducing direct evidence. The defence has not been

able to dislodge the prosecution case. He also submitted that only because the witnesses who were relatives of the deceased were examined, it cannot be said that the prosecution case cannot be believed but it is the quality and not quantity of the witnesses to be considered for just decision of a case and the prosecution has examined the witnesses who have supported the prosecution case and therefore there was no need to examine other witnesses. He also submitted that there is no delay in lodging the complaint as immediately after the incident F.I.R. was lodged and the prosecution has proved the motive behind the incident. He submitted that the F.S.L. Report supports the prosecution case with regard to the injuries caused to the deceased by the muddamal weapons. He also submitted that looking to the time of the incident there would be no much traffic or public at the place of the incident and the presence of the eye witnesses is natural and therefore the prosecution has proved the case beyond reasonable doubt against the appellants and the appeal is required to be dismissed. In support of his submissions, he relied on the decision of the Supreme Court in Banti alias Guddu Vs. State of M.P. reported in 2004 Supreme Court Cases (Cri.) 294 and in the case of Kartik Malhar Vs. State of Bihar, reported in (1996) 1 Supreme Court Cases 614.

9. The prosecution mainly relied on the evidence of two eye witnesses P.W. 1 Ahmadbin Abudbin

Exh. 11 and P.W. 2 Huseinbhai Abudbin Exh. 12. Their evidence is supported by medical evidence P.W. 4 Dr. Navinchandra Nanalal Joshi Exh. 15

10. In order to prove that death was homicidal in nature the prosecution examined P.W. 4 Dr. Navinchandra Nanalal Joshi at Exh. 15. The witness stated that all the external injuries and internal injuries found on the person of the deceased were narrated in Columns No. 17 and No.20 of the P.M. Note Exh. 16 respectively. He also deposed that there were about 21 injuries on the dead body and injury Nos.1 and 3 individually were sufficient in the ordinary course of nature to cause death and all the injuries were caused on the vital part of the body of the deceased and such injuries were possible by the muddamal articles No. 13, and 14 knife and muddamal article No. 15 'gupti'. In the cross-examination of the witness, the defence has not been able to demonstrate that the injuries were not sufficient in the ordinary course of nature to cause death or that the injuries could not have been caused by muddamal weapons. The prosecution also proved the postmortem note Exh. 16 which indicates that cause of death is due to haemorrhage on account of injuries received and injury to vital organ lunge and heart. It also indicates that the external injuries found on the dead body were possible by the weapons like knife and 'gupti'. Therefore, it is proved that the death of Alibhai was homicidal in nature.

11. The prosecution examined eye-witness P.W.1 Ahmadbin Abudbin who is the brother of deceased Alibhai at Exh. 11. The witness deposed that the incident occurred between 1-00 or 2-00 a.m. on 13-3-1997 when he and that he and his brother Hasanbhai were returning in Husanbhai's auto-rickshaw from Moti Bazaar and when they reached near Patel's deli at Pandheriya Sheri they saw the accused assaulting his brother Alibhai with knives and gupti. The witness further deposed that accused No. 1 – Asmal Ibrahim Sandhi had 'gupti' and other two accused had knife and the accused ran away towards panjarapole with their weapons as both the brothers alighted from auto-rickshaw and went near their brother Alibhai. He also deposed that as none was there both the brothers took Alibhai in auto-rickshaw to the hospital and the Doctor was called who came after about 20 to 25 minutes and examined his brother Alibhai who was declared dead and thereafter, his brother remained at the hospital and he went to the police station to lodge the compliant. The witness deposed that they had purchased the property wherein the accused were residing and a suit was filed against them for getting possession of the said property and that the accused went to Rajkot after applying lock to the property and the incident has occurred on account of grudge as the suit is filed. In the cross-examination, the witness deposed that he and Hasanbhai were plying auto-rickshaw and Hasanbhai had his own auto-rickshaw and he was plying the same on rent. The witness deposed that on

the day of incident he had returned his auto-rickshaw to its owner at about 1-00 O'clock after midnight and he and Hasanbhai met at college chowk and he asked Hasanbhai to leave him at his residence. The witness also deposed that there are residences in Pandheriya sheri and Patel Deli. In the cross-examination the witness further deposed that as the accused saw them alighting from auto-rickshaw, they ran away and it had not happened that the accused ran away as they intervened. The witness also deposed that they neither shouted nor stopped the accused from assaulting the deceased nor chased them. The witness deposed that they did not chase the accused as they wanted to take his injured brother to the hospital in order to save him. The witness deposed that they reached the hospital at about 2-00 or 2-15 a.m. and one peon was asked to call the doctor who came after 20 to 25 minutes and examined the injured. The witness further deposed that he saw that the accused inflicted 3 to 4 blows to Alibhai. The witness deposed that they put Alibhai in auto-rickshaw by holding his hands and legs and their clothes did not sustain blood stains but the blood drops fell in the auto-rickshaw. The witness denied that when they reached at Pandheriya sheri they saw his brother Alibhai lying dead and they did not give names of the assailants to the Doctor as they did not see any one assaulting the victim.

12. They prosecution also examined eye witness

P.W. 2 Huseinbhai Abudbin at Exh. 12. He deposed on the day of incident at about 1-00 to 2-00 at night he went to college chowk to leave passenger where his brother P.W. 1 Ahmed met him, so he offered his brother a lift in his auto-rickshaw. He also deposed that when they reached at the end of Khanderia sheri they saw accused assaulting his brother with knife and gupti. He also deposed that accused No. 3 Amad Ibrahim had gupti and others had knife. He also deposed that the accused were their tenants and persons from the locality had made complaints against them. So the accused believed that Alibhai had a hand in that and a suit is filed against the accused therefore the incident has occurred on account of grudge. In the cross-examination the witness deposed that his brother Alibhai was taken to the hospital in auto-rickshaw and was driving the same and P.W. 1 Ahmadbin had kept Alibhai's head in his lap in the auto-rickshaw. He also deposed that the auto-rickshaw was blood stained but no panchanama was drawn. He also admitted that he did not give names of the assailants to the doctor. He also denied that as a suit was pending between them he is falsely implicating the accused.

13. On appreciation the oral depositions of these witnesses, it appears that they saw the appellants assaulting their brother Alibhai with weapons when they were coming in auto-rickshaw. The learned advocate for the appellants tried to demonstrate that the presence of the witnesses at the time of the

incident is not natural and the witness must have reached at the place of offence after the incident was over. It appears from the evidence that P.W. 1 Ahmadbin and his brother deceased Alibhai were staying in same the premises near Pandheriya sheri and P.W. 1 Ahmadbin requested his brother P.W. 2 Hasanbhai to give him a lift and drop him at his residence in the auto-rickshaw for which his brother readily agreed. In view of this evidence, it becomes clear that both the witnesses were plying auto-rickshaw for their livelihood. It is quite known that the auto-rickshaw drivers run their auto-rickshaw till late night. Therefore, the presence of the witnesses at the place of incident is natural as the place is towards the residence of P.W. 2 Huseinbhai and Alibhai. The defence tried to prove contradictions of these two witnesses but the contradictions are minor and in our view they are not fatal to the prosecution case. Learned advocate for the appellants has not been able to demonstrate that the presence of the witnesses is not probable at the place and time of the incident and therefore their depositions cannot be relied upon to connect the appellants. Therefore, it cannot be said that presence of the witnesses was not probable at the place and time of offence.

14. As discussed above, the presence of both the witnesses becomes very natural and probable. Therefore, it cannot be said that both the witnesses are chance witnesses and their presence is doubtful

at the time of the incident. Therefore, we are unable to accept the submission of the learned advocate for the appellants that both the witnesses could not have been present at the time of occurrence of the incident.

15. The prosecution examined P.W. 13 Babulal Arjanbhai Godvachiya at Exh. 32 who was Traffic Controller of Gondal S.T. Depot. The witness deposed that deceased Alibhai was working as a driver in Gondal S.T. Depot and the deceased went to Lunavada (Godhara) from Gondal taking his bus in the morning at 5-00 O'clock on 11-3-1997 and returned at 12-00 midnight on 12-3-1997. The witness is not cross-examined. Learned advocate for the appellants submitted that in view of this evidence the presence of the victim at the place of incident is not probable and the incident must have occurred prior to the time alleged by the prosecution. In our view, this submission of the learned advocate for the appellants cannot be accepted because the evidence indicates the deceased had returned to Gondal from Lunavada (Godhara). There is no evidence about the exact timings of return of Alibhai. However, looking to the evidence, it would be difficult to believe that Alibhai could not have been at the place of incident as alleged by the prosecution. Therefore, the presence of the deceased at the time and place of offence is quite natural. The defence has not been able to demonstrate that the presence of the deceased was not probable. It is argued by

the learned advocate for the appellants that there is no evidence that the deceased and the witnesses raised shouts or the witnesses tried to rescue the deceased and in absence of independent witness the prosecution case is doubtful. In our view, the evidence indicates that the incident occurred late in the night. The incident occurred in a residential locality. P.W. No.2 Husein also stated in his deposition that after the incident they waited for five minutes but as none was there they lifted Alibhai and put him in auto-rickshaw. Therefore, it is clear that no one was near the place of incident. The evidence also indicates that the assailants ran away as the witnesses alighted from auto-rickshaw. Therefore, there is no question of shouting or resuming the victim. In such situation, normal conduct of a person would be to take the victim who is brother to take him to the hospital rather than chasing the assailants. Therefore, this submission cannot be accepted. As regards examination of independent witness it is the quality of the witness and not the quantity of witness to be seen. **In the decision of the Supreme Court in the case of Banti Alias Guddu reported in 2004 Supreme Court Cases (Cri.) 294, wherein the Supreme Court observed that the Public Prosecutor is required to produce the evidence which is in support of the prosecution and not against it. If there are many witnesses on the same point or many witnesses who had suffered injuries in the same occurrence, P.P. May choose only some of them and inform the court that he would**

not examine the remaining persons. In view of this decision, the prosecution examined the persons who had seen the incident. The defence has not been able to demonstrate that other witnesses were present at the time of incident. The cardinal principle of criminal trial is that the prosecution has to lead best evidence and it is the quality of the witnesses and not the quantity witnesses to prove the case. In this case, the prosecution examined the witnesses present at the time of incident. There is no evidence that other witnesses were present but not examined with a specific object. Therefore, the submission that as no other independent witness is examined the prosecution case cannot be believed, cannot be accepted.

16. The prosecution examined Panch witnesses to prove the panchnama of discovery of the muddamal weapons. However, the panch witnesses have not supported the prosecution case and they have been declared hostile.

17. Investigating Officer P.W. 18 Junjarsinh Kodarsinh Ramlavat is examined at at Exh. 38. According tot he witness, the muddamal weapons were discovered at the instance of the appellants and panchanamas were drawn. However, it appears from the panchanamas that the discovery of weapons was made from the open place and therefore it would not be safe to rely upon such panchanamas to connect the appellants with the offence. The medical

evidence indicates that the deceased had sustained 21 external injuries by the weapon like knife and “gupti”. The evidence indicates that the injuries were possible by muddamal weapons knife and gupti and the appellants were armed with such weapons. The evidence also indicates that the deceased was killed brutally by inflicting about 21 injuries with such weapons by the appellants. Therefore, in our view, the prosecution proved beyond reasonable doubt that the injuries found on deceased Alibhai were possible by muddamal article weapons like knives and “gupti”. Therefore, in our view, the prosecution proved beyond reasonable doubt that the deceased sustained the injuries by such weapons and he succumbed to the injuries on account of assault by the appellants.

18. It is argued by learned advocate Mr. Buddhabhatti for the appellants that the evidence of the eye witnesses is in conflict with the medical evidence. However, we are unable to accept this submission as both the eye witnesses have in their deposition stated about the manner in which the deceased was assaulted. The medical evidence postmortem note Exh. 16 and inquest panchanama Exh. 19 clearly indicate the injuries found on the dead body. Therefore, in our view, there is no conflict as submitted by the learned advocate for the appellants.

19. It is also submitted by the learned advocate

for the appellants that the witnesses must have reached at the place of the incident after the incident was over and the witnesses could not have witnessed the incident. In our view, the submission cannot be accepted as the evidence indicates that the victim had returned after his duty was over around midnight and the witnesses were at their home after their work. Therefore, in our view, it cannot be accepted that the incident had occurred prior to arrival of the witnesses at the place of the incident.

20. According to the prosecution, after the incident the witnesses took the deceased to the hospital in auto-rickshaw. Learned advocate Mr. Buddhabhatti for the appellants, argued that the clothes of the witnesses were not blood stained and no panchnama of their clothes or auto-rickshaw in question is drawn by the police and hence there is suspicion about the oral version of the witnesses.

21. It appears from the evidence of P.W. 1 Ahmadbin Exh. 11 that the victim was lifted by his legs and hands by both the witnesses. Therefore, the manner in which the victim was lifted, there may not be blood stain marks on the clothes of the witnesses. It also appears from the evidence that the victim was kept in the lap of P.W.2 Huseinbhai in the auto-rickshaw. The injuries noted in the postmortem note Exh. 16 indicates that the victim had sustained the injuries on his body but there was no bleeding from head and

hence there may not be any blood stain marks on the clothes of the witness in whose lap the victim was kept. It also appears from the cross-examination of P.W.2 Huseinbhai Exh.13 that hands of both the witnesses had blood stain marks. Therefore, in our view, it cannot be said that as there were no blood stain marks on the cloths of the witnesses the prosecution case cannot be believed. Furthermore, as regards non-drawing of panchanama of auto-rickshaw wherein the deceased was taken to the hospital, it is true that the investigating agency has not drawn panchanama in that regard. However, that cannot be considered as a fatal lapse on the part of the investigating agency. Such lapse does not prejudice the appellants – accused and therefore the prosecution case cannot be thrown away only on this ground.

22. It is also argued by the learned advocate for the appellants that there is delay in lodging the F.I.R. and that delay has not been explained. The F.I..R. produced at Exh.39 indicates that the incident had occurred around 2-00 a.m. on 13-3-1997 and it was reported to the police at 3-30 a.m. on the same day. The evidence of P.W. 1 Ahmadbin Exh. 11 and P.W. 2 Huseinbhai Exh. 12 indicates that after the incident they took the victim to the hospital, but as the doctor was not present a peon was sent to call the doctor who came after 20 to 25 minutes and after examining the victim, he declared the victim dead and thereafter one of the witnesses

went to the police station to lodge the F.I.R. In view of this evidence, in our view, there is no delay in lodging the F.I.R. and therefore the submission of the learned advocate for the appellant that there was delay in lodging the F.I.R., cannot be accepted.

23. In view above, we are of the considered view that the learned trial Judge was justified in recording the conviction of the appellants and has not committed any error in reaching to the conclusion that the prosecution proved the charge against the appellants beyond reasonable doubt. Therefore, no interference is warranted in the judgment and order of conviction passed by the learned trial Judge.

24. In view above discussion, the appeal fails and is dismissed and the judgment and order of conviction dated 6.11.1998 passed by the learned Addl. Sessions Judge, Gondal, Dist. Rajkot in Sessions Case No. 92 of 1997 is confirmed.

(A.L. Dave, J.)

(Bankim N. Mehta,J.)

/JVSatwara/